# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 18, 2011 |
| v | No. 301434<br>Wayne Circuit Court |
| VIRGINIA ANN HOMBERG,<br><br>Defendant-Appellant. | LC No. 10-004189 |

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

In this criminal sexual conduct case, defendant, Virginia Homberg was convicted by jury of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (victim age 13-16, defendant a teacher), and two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(e) (victim age 16-18, defendant a teacher). Defendant was sentenced, to 10 to 25 years imprisonment for the CSC I conviction, and to 3 to 15 years for each conviction of CSC III, to be served concurrently. Defendant now appeals as of right. We affirm.

## I. FACTS

Defendant was a special education teacher at Garden City Middle School and then at Garden City High School. The alleged victim, T.D., was a student in defendant's class when he was in the eighth grade at the middle school and then again in high school in the tenth grade.

T.D. testified that at the time of his testimony, he was 16 years old. He attended Garden City High School. He met defendant in eighth grade while attending Garden City Middle School. Defendant was his special education class teacher in the eighth grade and again in the tenth grade. Defendant was a family friend who did favors for the family, particularly when his mother was ill. T.D. testified that defendant was very open with many of her students. Defendant often gave them lunch money when they needed it, bottles of water from her refrigerator in her office by her classroom, her personal cell phone number, and any support they may need.

T.D. testified that the first time "something unusual" happened was when he was in the eighth grade (under 16 years old) and defendant came over to the house, came into his downstairs bedroom, and "threw me on the bed, got on top of me., [and] [w]e had sex." She put his penis in her vagina and he ejaculated. T.D. testified that on another occasion, when he was in

the 10th grade, and still under 16 years old, he had gone up to the office by defendant's classroom to get his water for wrestling practice. Defendant came into the office, "started taking off her clothes again and unbuckled my belt again. I sat down on the table, and she got on top of me again." His penis was in her vagina and he ejaculated.

T.D. testified he never told anyone or discussed it with defendant. T.D. claimed that he had sex with defendant when he was again in the office up the stairs by defendant's classroom. He had no recollection of the date or specific circumstances other than he was 16 and that "she laid down on the table . . . and then she pulled me to her, and then we had sex again." Defendant's head was on the table, yet her feet were on the floor. T.D. also claimed his feet were on the floor; he couldn't recall whether he ejaculated. Another time, T.D. had an "away" wrestling match and asked defendant for a water. The two went up to the office, she closed the door, but left it unlocked, sat on a chair, and "we had sex again." T.D. missed the bus to the match and called his father to pick him up and take him to the match.

Prior to the charges being brought, T.D. repeatedly denied any improprieties with defendant when asked by Murrell, the school principal, his girlfriend, friends, a family lawyer, and his parents. Brian Aure was the Detective-Sergeant with the Garden City Police Department who was the officer-in-charge of this case. Aure's first step in the investigation was to have T.D. be interviewed.

Kate Oleksiak is a forensic interviewer at a facility called Kids Talk. She conducted an interview with T.D wherein he denied any sexual relations with the defendant. Aure watched the interview from another room and heard T.D. deny any sexual encounters with defendant. Aure, unsatisfied with the forensic interview, personally interviewed T.D. immediately following the Kids Talk interview in "a small interview room" at the police station. There, T.D. told Aure about the sexual encounters he had with defendant.

## II. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed prosecutorial misconduct when she intentionally disparaged defense counsel and purposefully mislead the jury by making statements that were inconsistent with the facts. We disagree.

Defendant raises two purported instances of prosecutorial misconduct, neither of which he preserved with an appropriate objection at trial. Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We consider unpreserved claims of prosecutorial misconduct only to ascertain whether any plain error affected the defendant's substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant contends that the prosecutor intentionally disparaged defense counsel when, during her closing argument, she stated:

> Well, in this case we have other evidence, and I'm going to talk about that in a moment. But in my opening statement I hope you recall that I told you that when T.D. testifies, we all make sure that he understands the question, that his answer is responsive, and that nobody is putting words in his mouth.
>
> I submit to you that on cross-examination the defense was able to put words in his mouth.
>
> Now Mrs. Smith [defense counsel] didn't do anything wrong. We have certain rules when we go to court. Just like baseball rules, we have court rules. The rules allow a defense attorney to ask what we call leading questions. They can suggest an answer. It is up to the witness to say no, that's wrong. This is what is right.
>
> On direct examination when I ask a question, I have to ask direct non-leading questions, and that's what I did. So, I am not saying that Ms. Smith did anything wrong, but when you are trying to get good, accurate information from someone who is easily led astray, asking leading questions is not the way to do it.
>
> I want to give you a couple of examples of things that happened when T.D. was on the witness stand.
>
> * * *
>
> She [defense counsel] also got him to say Sergeant Aure told him the facts of the case. . . .

A prosecutor has great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). Nevertheless, a prosecutor cannot personally attack defense counsel. *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010). And, a prosecutor cannot suggest that defense counsel is intentionally attempting to mislead the jury. *Fyda*, 288 Mich at 461. When a prosecutor does so, the prosecutor "is in effect stating that defense counsel does not believe his own client." *Id* .

In the present case, however, the prosecutor's arguments were proper. The prosecutor did not personally attack defense counsel; in fact, she repeatedly stated that she was not saying that defense counsel was doing anything wrong. *Likine*, 288 Mich App at 659. The prosecutor was attempting to explain the court rules to the jury, and to convey to them that T.D., whom testimony revealed to be a student in special education classes, might have a difficult time answering leading questions. The prosecutor was simply arguing the evidence when she asserted that defense counsel had been able to "put words in" T.D.'s mouth; the prosecutor was not required to confine her argument to the blandest possible terms. See *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

In addition, defendant argues that the prosecutor misinformed the jury with contradicting, untruthful statement regarding the instance where T.D. told Aure what had happened. Defendant argues that it was in fact the prosecutor who put words into T.D.'s mouth, and that when T.D. stated, "[h]e [Aure] told me [what happened], that was the truthful testimony. When one looks at the testimony as a whole, it is clear that T.D. testified that he initially denied any sexual abuse by defendant, but that he later opened up to Aure and told him that it really happened. If anything, this dialogue further supports the prosecutor's argument that T.D. may have a difficult time following a complicated question. We conclude that the prosecutor's comments did not constitute misconduct.

## III. VERDICT UNANIMITY

Defendant argues that the jurors could easily have been confused by the distinctive and separate sexual act that needed to be proven in each of the CSC I counts, and that the guilty verdict may not have been unanimous as to the act for each count. We disagree.

Questions of law involving jury instructions are generally reviewed de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). But a trial court's determination whether a jury instruction applies to the facts of the case is reviewed for an abuse of discretion. *Id.* Jury instructions are examined as a whole to determine whether error requiring reversal occurred. *People v Martin*, 271 Mich App 280, 337–338; 721 NW2d 815 (2006), *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if the instructions are imperfect, there is no error if the instructions fairly present the issues to the jury and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255–256; 732 NW2d 605 (2007).

Defendant was charged with two counts of CSC I (counts one and two) and two counts of CSC III (counts three and four). The charging document does not specify particular acts for each count. The jury found defendant not guilty of CSC I in count one, and guilty of CSC I in count two. Defendant contends that it is unclear whether count two refers to the act at T.D.'s house or an act at the school when he was not yet sixteen years old. He argues that the jurors could easily have been confused by the distinctive and separate sexual act that needed to be proved in each of the CSC I counts, and not been unanimous as to the act for each count.

Following jury instructions, the trial court asked the attorneys if there were any "objections to the instructions, or any additions [sic] objections to the charge?" Defense counsel stated, "[n]o, your Honor." Because defense counsel specifically indicated that he had no objections to the instructions as given, this claim of instructional error has been waived. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). A waiver, as distinguished from an issue forfeited by lack of objection, extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). We conclude that defendant waived this issue.

Nonetheless, even if defendant had not waived this issue, we would conclude that defendant was not entitled to a specific unanimity instruction. When reviewing claims of instructional error, this Court examines the instructions in their entirety, and if the instructions adequately protected the defendant's rights by fairly presenting the issues to the jury, there is no basis for reversal. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). Jury instructions must include all the elements of the charged offense and must not exclude material

issues, defenses, and theories if the evidence supports them. Further, error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Thus, "[i]nstructions that are somewhat imperfect are acceptable, as long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant." *People v Perry*, 218 Mich App 520, 526, 554 NW2d 362 (1996).

In most cases a general unanimity instruction is sufficient to protect a defendant's rights to a unanimous verdict. *Cooks*, 446 Mich 524; *Martin*, 271 Mich App at 337-338. A specific unanimity instruction is only required when there is evidence of multiple, alternative acts allegedly committed by a defendant, which each satisfy the actus reus elements of a single charged offense, and (1) "'the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives,'" or (2) "'there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt.'" *Martin*, 271 Mich App 228, quoting *Cooks*, 446 Mich 524.

Defendant argues that the trial court failed to specifically delineate the conduct underlying each of the respective CSC I charges, and failed to specifically advise the jurors that they must all agree that the same act of criminal sexual conduct occurred to return a guilty verdict on either or both of the two CSC I charges. Therefore, defendant claims, the verdict against him may not have been unanimous.

Here, T.D. testified to two separate sexual penetrations when he was age 13-16 and the jury was presented with two separate counts of CSC I. The trial court instructed the jury that it was to consider each charged offense separately and that its verdict must be unanimous. Merely because the trial court did not specify that count one pertained to the first alleged act and count two to the second alleged act does not undermine this verdict. T.D. testified to two distinct, sequential penetrations and defendant was charged with two separate counts of CSC I. In this context it is clear that the two counts of CSC I upon which the jury was instructed sequentially referred to the two incidents testified to by T.D. Therefore, this case is to be distinguished from those cases where there is a situation presenting multiple, alternative acts, each of which satisfied the actus reus element of a single charged offense. Furthermore, there is no indication that the jury was confused or disagreed about the factual basis of defendant's guilt on count two. Consequently, the general unanimity instruction given by the trial court was sufficient. *Cooks*, 446 Mich at 524; *Martin*, 271 Mich App at 337-338.

## IV. FAIR AND IMPARTIAL JURY

Finally, defendant argues that the trial court erred by continuing the trial after questioning juror number three about the alleged witness coaching. We disagree.

Defense counsel did not object to the trial court's handling of this issue on the record, nor did he move for a mistrial. Therefore, this issue is unpreserved. We review unpreserved claims of constitutional error for plain error affecting his substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

On the second day of trial, before the jury was seated for the day, the trial court stated that one of his deputies had told him [the judge] that people in the audience had told him [the deputy] that it appeared that a person who was an attorney/friend of the Detoy family was gesturing or signaling to T.D. while he testified. Further, one of the jurors witnessed the alleged "coaching." The judge then questioned juror three about what she had seen, and she replied, "when I looked, glanced at him [the Detoys' friend/attorney], it could have been a gesture made as far as shaking his head, or it might have just been him shaking his head, but to me it looked like it was a gesture being made." She stated that she observed this happen only once and that she thought maybe one other juror had seen it as well, but she couldn't say which juror it was. The judge then held a sidebar conference off the record, following which the jury was brought in and the trial continued. There was no further mention of this incident.

A defendant has a right to a fair and impartial jury. *People v Budzyn,* 456 Mich 77, 88; 566 NW2d 229 (1997). To show the denial of a fair and impartial jury in this context, a defendant must show that the jury was exposed to extraneous influences and that the extraneous influences "created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 88–89. Due process only demands that jurors act with a "lack of partiality, not an empty mind." *Id.* at 519.

The United States and Michigan Constitutions guarantee a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. The trial court must take appropriate steps to ensure that jurors will not be exposed to information or influences that could affect their ability to render an impartial verdict based on the evidence admitted in court. MCR 6.414(A). However, '"due process does not require a new trial every time a juror has been placed in a potentially compromising situation."' *People v Grove,* 455 Mich 439, 472; 566 NW2d 547 (1997), quoting *Smith v Phillips,* 455 US 209, 217; 102 S Ct 940; 71 L Ed 2d 78 (1982).

Michigan courts have long safeguarded a defendant's right to have a jury resolve factual disputes and make credibility determinations. See *People v Hamm,* 100 Mich App 429, 433; 298 NW2d 896 (1980) (characterizing the right to a jury in a criminal trial as "sacred"); see also Const 1963, art 1, § 20 (guaranteeing that, in every criminal prosecution, the "accused shall have the right to a speedy and public trial by an impartial jury."). The right to a fair and impartial jury extends also to the people, who have a right to have a jury that will ensure a "righteous verdict." *People v Bigge,* 297 Mich 58, 64; 297 NW 70 (1941) (quotation marks and citation omitted).

The trial court instructed the jurors that they were to be fair and impartial, and not be influenced by prejudice or bias. "It is well established that jurors are presumed to follow their instructions." *Graves,* 458 Mich at 486. The Sixth Amendment only requires that the jury be free from bias. *People v Miller,* 482 Mich 540, 544; 759 NW2d 850 (2008). However, the fact remains that there was *no evidence* to prove that the juror's observation of one instance of possible witness coaching resulted in actual bias to defendant. *Id.* "[J]urors are 'presumed to be ... impartial, until the contrary is shown.'" *Id.* at 550, quoting *Holt,* 13 Mich at 228. "The burden is on the defendant to establish that the juror was not impartial . . ." *Miller,* 482 Mich at 550. Defendant offered no evidence to rebut the presumption that juror number three acted impartially. See *id.* at 553-554. Here, it would seem that if anything the alleged witness

coaching would be damaging to T.D.'s credibility, rather than damaging to defendant. Defendant has not demonstrated the requisite plain error affecting his substantial rights.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell